Supreme Court, U.S.
FILED

95-894 DEC 7 1995

OFFICE OF THE CLERK

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995

GORDON FITZGERALD ,
Petitioner

v.

ALAN P. BAYHAM JR., 'ET AL',
Respondents

On Petition for Writ of Certiorari
To The Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

JOHN LEZDEY
having an office at
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Counsel of Record for Petitioner

QUESTIONS PRESENTED

1. WHETHER

The Arizona Supreme Court's admitted BAR supervisory policy of rehabilitation of lawyers rather than punishment can lawfully be extended to deny dissolved corporation shareholder civil suit actions against lawyers found guilty of malpractice by the BAR when that court policy necessitates violation of Arizona statute substantive law and civil rights /due process guarantees of the Arizona and United States Constitution's right to defend, protect and collect the value of a malpractice asset claim owned as a result of lawyer corporate legal malpractice that destroyed a 'Sub S ' corporation.

2. WHETHER

"Sub Chapter S" Corporation shareholders of a dissolved corporation are directly financially impacted and therefore entitled to prosecute claims pertaining to financial damages incured as a direct result of lawyer malpractice. (compared to shareholders of a regular corporation)

3. WHETHER

Legal malpractice asset claims of a dissolved corporation must be properly identifed as 'physical harm' or 'economic harm' claims .

Gordon Fitzgerald,

Petitioner

v.

Alan P. Bayham Jr. and Deborah Bayham, husband and wife;
Robert Beucler and Jane Doe Beucler, husband and wife
William Brown and Jane Doe Brown, husband and wife
William Reckling and Jane Doe Reckling, husband and wife,
Bayham& Beucler P.C.,lawyers,an Arizona Corporation;
Bayham , Beucler, Reckling & Brown, P.C. Lawyers,
an Arizona Corporation

Respondents

Rule 29.1 Statement:

Phoenix Systems International Inc. was at all times relevant an Arizona Sub S Corporation with no other affiliates, engaged in interstate commerce and licensed to do business in the state of Arizona.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995

Gordon Fitzgerald ,

Petitioner

v.

Alan P. Bayham Jr., et al,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

Gordon Fitzgerald, respectfully petitions for a writ of certiorari to review Arizona's Supreme Court September 14, 1995 order denying review of Arizona's Appeal court May 19, 1995 order dismissing Petitioner's civil / due process right to sue Respondents to recover the value of a legal malpractice asset /claim acquired by malpractice caused dissolution of a Sub S Corporation.

OPINIONS BELOW

July 26, 1994 Maricopa County Superior Court, ordered legal malpractice claim assets of a dissolved corporation could not be assigned by Arizona substantive law to shareholders to sue to protect such assets. October 7, 1994 an Arizona Bar Disciplinary Hearing Committee found Respondent Bayham guilty of legal malpractice acts claimed by Petitioner. May 19,1995 Arizona Appeal Court accelerated appeal concurred. September 14, 1995 Arizona's Supreme Court denied review. October 22,1995 Appeal court denied Appellant's Motion to Stay.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C.§ 1257(a)(3) RSC Rule 10 .1.(b)

FEDERAL AND STATE CONSTITUTION & SUBSTANTIVE STATUTE PROVISIONS

United States Constitution :

5TH Amendment Property & Right of Due Process "No person shall be deprived of life, liberty or property without due process of law." **7TH Amendment Civil Trials** "In courts of common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved" **14th Amendment Due Process** ; "Nor... shall any state deprive any person of life, liberty, or property without due process of law nor deny any person within its jurisdiction the equal protection of the law.

Arizona Constitution Article 2.

Section 4 Due Process "No person shall be deprived of live, liberty or property without due process of law": **Section 13 Equal Privileges And Immunity** ; "No law shall be enacted granting to any citizen, class of citizen or corporation, privileges or immunities which upon the same terms, shall not equally belong to all citizens or corporations."

Arizona Survival of Remedy After Dissolution Statutes;**A.R.S.§10-087 A(3) Procedure after filing of statement of Intent to dissolve** :"The corporation shall proceed to collect its cash, convert and dispose of such of its properties as are not be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations and do all other acts required liquidate its assets and business, and , after paying or adequately providing for the payment of all its obligations, distribute the remainder of its assets, either in cash or in kind, among its shareholders according to their respective rights and interests.": **ARS 10-105 Survival of Remedy After Dissolution;** "Dissolution of a corporation ...shall not take away or impair any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing

and The shareholders, directors and officers have power to take such corporate or other action as shall be appropriate to protect such remedy right or claim."

A.R.S.§12-109 Promulgation of rules of pleading, practice and procedure : "The supreme Court, by rules promulgated from time to time, shall regulate pleading, practice and procedure in judicial proceedings in all courts ..for the purpose of simplifying such pleading, practice and procedure and promoting speedy determination of litigation upon its merits. The rules shall not abridge, enlarge or modify substantive rights of a litigant. "

STATEMENT OF THE CASE

Pursuant to Supeme Court Rule14.1.(h) theU.S. Constitution was first cited by Fitzgerald Pro Se in a trial court Motion To Set Aside Court Order of 4 April 1994 Dismissing This Law Suit, as follows;" For the court to deny Plaintiff Fitzgerald of the right to pursue recovery for the loss is a denial of due process of law under the 5th and 14th amendments of the United States Constitution and Arizona Constitution art. 2, Sec 4." Trial court never addressed this issue. In Appeal Court Fitzgerald cited U.S./ Arizona Constitutions in oral argument (text copied in full to the Supreme Court) Neither Court addressed the issue.(see **Appendix 3** Supreme Ct. reference to ; "Petition for Review And Or Alternatively for Summary Remand of This Case To Trial Court Based On Constitutional & Statutory Grounds.")

Petitioner Fitzgerald, Phoenix Systems International Inc. (PSI) ,shareholder ,director, C.E.O. , hired Respondent lawyers/firm to represent PSI in the underlying law suit. PSI operated in interstate commerce under A.R.S.§10-092 rules until December 1992 when Respondent s abandoned PSI in the middle of litigation in favor of another client (not telling Fitzgerald) thus directly causing PSI's insolvency and demise.

Fitzgerald pro per as sole remaining shareholder of PSI (a sub chapter S corporation)brought this suit claiming Breach of Contract, Malpractice, Fraud and several million dollars in damages.

RELATED TV NEWS INCIDENT

On October 3, 1995 Reporter Bob Woodruff (KNXV-TV - Phoenix) , a graduate of Univ. of Michigan Law School who taught American Law at the University of Beijing ,China , exposed the Arizona Supreme Court policy of protecting lawyers from punishment for legal malpractice acts in favor of a policy of rehabilitation Example 1: Lawyer Shawn Connelly, A BAR recommended 4 month suspension. was reduced by Supreme Ct. justices to 'zero' as Connelly was about to be a judge in Tucson. (fired by the Tucson city council after Woodruffs expose´.) Example 2 ; Lawyer Len Brown BAR recommended sentence, 5 year suspension.,... Justices reduced it to 'zero' as he was about to be a County Prosecuting Attorney (Brown, after 30 days quit, and is practicing private law, with several new malpractice charges); Example3: Respondent Bayham's BAR sentence was informal reprimand. ABA standards require disbarment in similar circumstances.[1] (Bayham's sister is a Maricopa County Superior court commissioner. By court order the Appeal Court decision was not published) ,

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[1] in re Firoamonti 147 Ariz. Adv Rep 25 at 29 : in determining the appropriate sanction to be imposed, we should focus on such considerations as the maintenance of the integrity of the profession in the eyes of the public, the protection of the public from unethical or incompetent lawyers, and the deterrence of other lawyers from engaging in unprofessional conduct . In re Murray 159 Ariz.280, 282, 767 P12d 1,3 (1988) When imposing discipline, it is appropriate to examine sanctions imposed in factually similar cases and to consider the American Bar Association Standards (ABA standards) for imposing lawyer Discipline." Note: ABA standards in similar situations to Bayham require disbarment.

A former Arizona judge and other legal scholars believe it was not published because it violates substantive law and Arizona / U S. Constitution's). Woodruff interview quotes included;

Arizona BAR President Mike Kemerer ;

" Bench public office should not be a safe haven for lawyers who violate legal ethics and than are permitted to escape the consequences of their actions by going into public service."

Chief BAR Council Margaret Downey :

" this supreme court has been more concerned with rehabilitation of lawyers than punishment of lawyers".

A. PSI Dissolved Under Arizona Law

Arizona's Corporation Commission on August 27, 1992 confirmed PSI intent to dissolve. On September 16, 1992 Arizona's Department of Revenue certified PSI met dissolution requirements .

B. By Arizona Substantive Law Petitioner Inherited PSI's Legal Malpractice Asset Claim

By virtue of A.R.S.§10-087,(A)3, Dissolved Corporation Survival of Remedy substantive law, Petitioner acquired ownership of PSI's malpractice asset claim. Appeal court in its opinion (pg. 4 sec. B) admits PSI's legal malpractice claim was an asset of PSI but ruled "(ARS 10-087) does not convert a corporate asset, such as a cause of action for malpractice, into property belonging to an individual shareholder". The statute clearly states distribution of all assets is mandatory (no exceptions) and had to be'in kind' to Fitzgerald. Also , Respondents admitted in their motions that the malpractice claim was a PSI ' asset'.

Substantive statute A.R.S.§10-105 guarantees property and or assets distributed to shareholders under ARS § 10-087 can not be impaired or taken away. [2] ,[3]

C. Arizona's Trial Court, Appeal Court, Supreme Court Ignored Violated and or Misinterpreted Arizona / United States Constitutions And Substantive Law.

1. The Bar Found Bayham Guilty Of Alleged Malpractice Acts

The BAR found as legal fact that: Bayham had a contract with PSI; abandoned PSI in the middle of a law suit without telling PSI / Fitzgerald ; did not correspond with Fitzgerald for over a year in spite of repeated requests to do so; admitted he represented another client and knowingly failed to represent PSI without informing Petitioner ; lied to the court; submitted false documents to the court; attempted to enlist another lawyer to assist in covering up false documents; was sanctioned by the court ; lied to the bar. Any person or entity, (not a lawyer) committing similar acts under contract would be subject to an economic harm breach of contract law suit

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[2] United Bank of Arizona v. Sun Valley Door; 149 Ariz. 64 App at 66/68 P.2d (App. 1986);" there exists an implicit nexus between ARS§§10-087(A)3,10-105; ... corporation directors /shareholders ... may employ any reasonable remedy to facilitate the limited statutory purpose during the winding up process";

[3] 19 C.J.S. Corporations § 859@514 Effect On Torts; " A corporation or those representing it have been held liable even after a dissolution for torts committed prior to dissolution" See Nudelman v. Thimbles 40 S.W. .2d 475, 225, Mo. App. 553: 19 C.J.S. Corporations §853 at 508 Liability for breach of contract : " The corporations right of action for damages for a breach by the other party may be enforced by its former stockholders or by others succeeding to its property or rights" Smyth v. Kenwood Land Co., 190 P. 962 97 Or. 19.

by PSI surviving shareholders per A.R.S.§§ 10-087 & 10-105. [4]

2. U.S. / Arizona Constitution Guarantees Violated

U. S. Constitution 14th Amendment ;" guarantee that no state can deprive any person of property without due process of law nor deny equal protection of the law was violated The 5th Amendment: No person shall be deprived of property without due process of law and 7th Amendment the right of trial by jury shall be preserved were violated.

Arizona Constitution Section 13 prohibiting granting a class of citizen (lawyers) privileges or immunities which upon the same terms, shall not equally belong to all citizens or corporations was violated. Section 4 : "No person shall be deprived of property without due process of law" was violated. The courts ignored both Constitutions so as to provide lawyers protection from a civil law suit alleging damages in millions of dollars. This was not done by substantive law but with court originated rules / laws etc used to grant immunities to lawyers not equally available to others (non lawyers) under contract to perform an equivilant service who would be subject ,under these same laws , to prosecution.

3. Arizona Courts Violated Their Stature Authority In Applying Court initiated Rules / Laws

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[4] ABA/BNA lawyers manual on Professional conduct 301:131 Negligence And Breach Of Contract, Measure of Damages; "An attorney found guilty of malpractice is liable to an aggrieved client for the full extent of the loss inflicted. This means all damages that reasonably and foreseeable arise as a natural result of the attorneys malpractice. The rule is in harmony with the general law as to damages."

Citing court generated law, (not substantive law,) Appeal court ruled Bayham malpractice acts committed against PSI caused "physical harm" not economic harm and by another court rule of law "physical harm" claims can not be transferred to a 3rd party so therefore Fitzgerald could not sue Bayham et al. Laws relied on by Appeal court to deny due process were generated under A.R.S.§12-109A authority that specifically prohibits any law that abridges, or modifies, substantive rights of a litigant. 12-109 [5] case examples clearly describe limitations of court authority to use its own generated laws . Arizona courts (to enforce the Arizona supreme court policy of "rehabilitation not prosecution of fellow lawyers")protected lawyer Respondents by exceeding their authority thus erroneously depriving Fitzgerald of his civil due process right to defend asset property guaranteed in the U.S. Constitution.(14th amendment). ARS. 12-109 requires merits of a case must be considered. In fact , no court considered the' merits' of Fitzgerald's complaint

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[5] Notes to ARS§ 12-109A. "*DeCamp v. Central Ariz. Light & Power Co.* "Rule making power of courts is not absolute but subject to limitations based on reasonableness and conformity to constitutional and statutory provisions. " *Jenkins v First Baptist Church of Scottsdale* " that power does not include power to abridge enlarge or modify substantive rights of a litigant"; *Burney v. Lee* the "legislature may exercise the rule making power and when it does, the courts will bow to such authority" *Daou v. Harris* "substantive rights created by statute cannot be enlarged or diminished by rules promulgated by the supreme court." *Southwestern Freight lines v. Schafer* (1941) 57, Ariz. 111,111 P.2d 625 "The purpose of granting power to supreme court to make rules of civil procedure was, among other things, the promotion of speedy determination of litigation upon its merits, and, interpreting the various provisions in cases of ambiguity, court will give that construction which will tend to promote a decision upon the merits rather than upon formal procedure."

4. Courts Refused To Apply The California Balancing Test Qualifying 3rd Party Litigants To Acquire Malpractice Litigation Rights.

Judge Contreras (Appeal court presiding judge) also participated in Gemstar v. Ernst & Young 184 Ariz. Adv. Rep 9, that admitted Arizona employs the California balancing test to determine if a 3rd party (Fitzgerald) could acquire malpractice claims.[6] Fitzgerald asked trial and appeal court judges to apply this test (Fitzgerald passes each requirement of the test.), The request was ignored. Instead Appeal court applied Arizona supreme court's' rehabilitation of lawyers not punishment policy " identified by Chief Bar Council M.Downey.

5. Appeal Court Acknowledged Other State Supreme Courts Rule Malpractice Claims Are Property [7] That Can Be Assigned But They Did Not Have To Concur.

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6 Georgetown Journal of Legal Ethics Vol. 6:1097 pg. 1102 ; "The California Balancing test (adapted by Arizona) recognizes the weaknesses of a strict privity requirement and sets out to alleviate them. The balancing test recognizes that public policy concerns may indicate that a 3rd party may be deserving of relief..."

7. Thurston v. Continental Casualty : "We are not here confronted with the establishment of a general market for such claims; this assignee has an intimate connection with the underlying lawsuit . ... A legal malpractice claim is not for personal injury but for economic harm. Hedlund Mfg. Co. v. Weiser . Stapler & Spivak, 517 Pa 522, 526,539 A.2d 357,259 (1988) The argument that legal services are personal and involve confidential attorney-client relationships does not justify preventing a client .. from realizing the value of its malpractice claim in what may be the most efficient way possible, namely its assignment to someone else with a clear interest in the claim who also has the time, energy and resources to bring the suit"

Jones v. Siesennop 371 N.E. 2d 895 "Legislative enactment's which are prospective in operation and phrased in terms comprehensive enough to include things of the same class subsequently coming into existence should be held applicable where such is consistent with the general legislative purpose. The word 'property' is a generic term and its meaning in any case

Maine, Illinois, Pennsylvania supreme courts recognize legal malpractice claims against a corporation are ' economic' claims not ' physical harm' claims. Arizona's Supreme Court denies this description in able to eroneously deny due process civil rights of shareholders of a dissolved corporation to prosecute legitimate substantive right claims against lawyers for malpractice . Malpractice acts of Respondents directly caused the demise, insolvency (economic harm) of PSI .

6. Appeal Court Used Eroneous Case Comparisons To Justify Its Decision To Deny Due Process

Appeal court ruled all legal malpractice acts against corporations must be regarded as physical harm claims not economic harm claims (and cited only cases involving insurance companies in automobile accident injury claims to make that illogical conclusion) and held that because auto accidents cases cited involved physical harm, all Arizona corporations who suffer harm due to legal malpractice suffer physical harm not economic harm . (See Thurston supra, Hedlund supra, Jones supra).

7. Appeal Court Used Eroneous Interpretations Of Cases To Negate Other State Supreme Court Rules Of Malpractice Claims Are Property.

Appeal court eroneously claimed Jones V. Siesennop supra (a survival statute) was later struck down in Clement v. Prestwich, 448 N.E. 2d 1039 (Ill 1983) Not true! Clement involved an automobile accident with

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must be determined by the sense in which it is used " The survival statute is remedial in nature and is to be liberally construed "*McDaniel* 34 Ill .2d at 492, 216 N.E. 2d 140. "there is no reason why an accrued action for professional negligence against an attorney should not also be construed as 'personal property' "

related assignment of physical harm claims and lawyer malpractice which does not relates to Jones supra that dealt with asset survival claims of a ' dead' entity (PSI).

8. Appeal Court Judges Ignored PSI stockholders Direct Liability Relationship As Shareholders Of A Sub Chapter S Corporation.

Petitioner Fitzgerald pleaded IRS regulations / tax law make shareholders " directly financially impacted' when legal malpractice directly causes a sub S corporation to become insolvent /dissolved and suffer a loss [8]. Appeal court refused to discuss or rule on this issue that , by tax law, PSI shareholders, directly impacted, have a direct claim on Respondents.

9. Appeal Court Refused To Acknowledge BAR Findings Of Legal Fact that Respondent Bayham Was Guilty Of Malpractice And Denied Fitzgerald Use of His Right Of Collateral Estoppel .

Fitzgerald claimed the right to collateral estoppel malpractice claims after the state BAR found Bayham guilty by legal fact, of having committed the very malpractice acts claimed in this civil suit. Appeal court not only refused to allow Fitzgerald to employ this right but also ruled BAR findings must be struck from the record and not acknowledged by the court. [9]

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[8] Shareholder Instructions Schedule K 1 Form 1120S " You the shareholder , are liable for income tax on your share of the corporations income , whether or not distributed, and you must include your share on your tax return if a return is required.

[9] ABA handbook for lawyers Negligence and Breach of Contract 301;129 (citing *Kuenh v. Garcia.*) & Legal Malpractice 3rd Edition §17.13 "Collateral estoppel has been characterized as a 'modern defense. "Availability of the defense requires the affirmative resolution of 4 questions. (1)was the issue decided in a prior adjudication identical to the malpractice issue presented in the present action (2) Was there a final

10. Appeal Court Wrongly Ruled A Retainer Contract Does Not Constitute An Agreement To Perform Any Specific Act

Citing Long v. Buckley, 129 Ariz. 141,143, 639 P.2d 557, 559 (app. 1981) Appeal court said " The retainer agreement between the attorney and client , however, dealt only with the payment of fees and failed to contain a promise to perform any specific acts." Not true based on the ABA Manual of Professional Conduct [10].

REASONS FOR GRANTING THIS PETITION

I. Arizona's Supreme Court Has Promulgated Its BAR Policy Of "Protection of Lawyers From Punishment (Admitted by Chief Bar Attorney M. Downey) To be Similarly Applied In Court To Deny Petitioner's Due Process Constitutional Rights To Protect His Asset Property . Only This Court Can Stop That Practice.

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judgment on the merits ?(3) Is the party against whom the defense is asserted a party or in privity with a party to the prior adjudication ? (4) Will the application of the defense work an injustice? Avoiding justice usually requires that there was the opportunity to litigate the disputed issue. The effect of the defense is the same as res judicata in that it precludes a party on an issue which was determined by a valid judgmen . The 'estoppel' prevents the party from re-litigating the issue in a subsequent action. "

[10] ABA/BNA Manual of Professional Conduct Negligence & Breach of Contract 301:107 ;" A cause of action for legal malpractice must be brought under either a tort or a contract theory, but as a substantive basis for liability the distinction between the two is usually unimportant.... In the typical malpractice suit for breach of contract, the theory of recovery is that when an attorney agrees to represent a client, the attorney impliedly promises that the representation will be performed diligently and competently. If this promise is broken the attorney can be held liable for a breach of contract. The facts that constitute a breach of the implied promise of due care will also constitute a breach of legal duty. THUS quite often the distinction between tort and contract theories of recovery is merely theoretical"

Using court generated rules, laws etc. the Arizona Supreme Court , to protect fellow class lawyers from civil claims for malpractice, has done an "end run" around the Constitution's of the United States and Arizona (that guarantee due process protection of property) and state substantive law that assures shareholders of a dissolved corporation that they are ultimate owners , in cash or in kind, of all ' assets and claims " of the corporation. In doing so the court has granted special privileges / immunities to lawyers not available to all in a similar situation on an equal basis.

II. There is A Conflict Between Illinois, Maine , Pennsylvania & Arizona Supreme Courts Re; Are Legal Malpractice claims Corporate Asset Property And Whether Such Claims Are Corporate Physical Harm Claims or Economic Harm Claims .

Illinois, Maine and Pennsylvania Supreme Courts rule these claims are asset property and represent economic harm. Arizona's Supreme Court refuses to address the issue. Clarification is needed to prevent unreasonable due process delays or denial of prosecution of shareholder malpractice claims of insolvent, dissolved sub chapter S corporations. Clarification is important to establish uniform / equal application of shareholder, trustee Constitutional due process rights in all courts

It is morally wrong to allow a lawyer to inflict mortal harm causing a company to become insolvent dissolved (dead) and than escape Trustee / shareholder efforts (equal to laws trustees utilize in bankruptcy).[11] to recover damages

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[11] U.S.C. § 541, 117 legal malpractice claims are assigned to a trustee in bankruptcy.

CONCLUSION

1. Trial, Appeal courts and Respondents admit (in court documents) PSI's malpractice claim is a financial asset.

2. Arizona substantive dissolution law requires all assets of a dissolved corporation must be distributed in cash "or in kind" to shareholders. Trial and Appeal Court denied Fitzgerald ownership of PSI's malpractice claim.

3. Arizona's and United States Constitutions do not allow a court to promulgate any rule or law that denies a plaintiffs due process right to protect his property/ assets or make a law granting lawyers as a class special privileges and immunities not equally available to all .

4. Arizona substantive statue permits courts to make rules /laws to govern courts but 'specifically' denies a court the right to make or enforce any court law or rule that negates legislative substantive law.

5. State legal authorities (Chief Bar Counsel and President of the Bar) admit the Arizona Supreme Court s policy is rehabilitation of lawyers instead of punishment for malpractice acts , a policy in direct contradiction to court stated public assurance that the BAR is meant to ' protect' the public and apply discipline based on ABA standards.[12]

6. Arizona's Supreme Court has caused its BAR policy of lawyer rehabilitation not punishment for malpractice

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[12] Ohio Appeal Judge Lawrence Grey, Arizona Republic, August 17, 1994. "No society can survive unless its legal system meets the people's reasonable expectations of justice and promotes and protects individual freedom and rights."

acts to be applied to deny court civil actions against malpractice lawyers. The Appeal Court order denying Petitioner's due process civil rights was so illegal the court ordered its findings not be published.

7. Arizona's Supreme court law/rule that corporate legal malpractice acts are physical harm not economic harm claims (and therefore can not be assigned to 3rd party shareholders of a corporation) has been discredited by other states supreme courts. As applied this is unconstitutional use of court generated law to protect lawyers from civil law suit economic consequences of malpractice acts.

THEREFORE:

The Petition For A Writ Of Certiorari should be granted for all reasons cited above , primarily to allow Petitiioner his due process rights and require the Arizona Supreme Court fullfill its stated policy promise to Arizona citizens that they will be protected from malpractice lawyers and be disciplined in accordance with ABA standards. Statements by the BAR president and Chief Counsel (plus honest lawyers of Arizona) demonstrate the Supreme Court's policy of non prosecution of bad lawyers is an embarassement contributing to public disgust of the legal profession. Only this court's power can insure this supreme court operates in accordance with its stated public policies and Constitutional rights of all Arizona citizens.

Respectfully submitted:

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APPENDIX

1. *Maricopa County Superior Court Order of July 26 ,1994*
Denying Due Process

2. *Arizona Appeal's Court Order of May 19, , 1995*
Dismissing Appeal

3. *Arizona Supreme Court Order of September 14,1995,*
Review denied

4. *Appeal Court Order of October 23, 1995*
Denied Motion to Stay

5. *Arizona Bar Disciplinary Committee 6A Report October 7, 1994*
Findings of Legal Fact Confirming;
Responsent Bayham Committed Malpractice Acts
Identified In Petitioner's Civil Action Complaint

Appendix 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

July 26, 1994

Honorable Michael Irwin
CASE NO. CV 93-12736
ORDER

Gordon Fitzgerald, Plaintiff
vs.
ALAN PL BAYHAM, JR., et al Defendants

At the conclusion of oral argument, Plaintiff's Motion to Vacate 6/23/94 Court Order, Motion to Delay 6/20/94 Court Ordered Hearing and Motion to Amend Complaint and Grant Plaintiff a New Trial, and Defendant's Motion for Attorneys Fees were taken under advisement. Having considered memoranda and argument Of counsel and the file herein,

The Court finds and concludes Plaintiff's Post Hearing Brief of April 4, 1994 was not a motion to amend. Plaintiff's Motion to Amend was not timely. The action was a malpractice action, the court cannot find by clear and convincing evidence plaintiff's claim was not made in good faith, and defendant is not entitled to attorneys fees.

IT IS THEREFORE ORDERED denying Plaintiff's motions and denying Defendant's Motion for Attorney's fees.

Dated this 26 Day of July, 1994

_____s_____
Michael Irwin
Judge of the Superior Court

Appendix 2

FILED May 19, 1995

Glen D Clark Clerk

by _____

IN THE COURT OF APPEALS
STATE OF ARIZONA DIVISION ONE

1 CA-CV 93-0119

GORDON FITZGERALD,
Plaintiff- Appellant,

DEPARTMENT E

DECISION ORDER

(Not for publication
Rule 29 A.R.C.P.)

v.
ALAN P. BAYHAM JR. et al
Defendants-Appellees

Appeal from the Superior Court of Maricopa County
Cause No. CV 92-12736
The Honorable Michael Irwin, Judge

AFFIRMED

Gordon E. Fitzgerald
Plaintiff-Appeallant in Propria Persona — Scottsdale

Broening, Oberg, Woods, Wilson & Cass
by Neal B. Thomas
John W. Oberg
Attorneys for Defendants-Appellees — Phoenix

Pursuant to an order by the Chief Judge of this court, Presiding judge Joe W. Contreras, and Judges Ruth V. McGregor and Melvyn T. Shelley [1] considered this

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[1] The honorable Melvyn T. Shelley, a retired judge of the court of appeals, was authorized to participate in this appeal by order of the Chief Justice of the Arizona Supreme Court pursuant to article 6, section 20, of the Arizona Constitution and A.R.S. section 38-813.

accelerated appeal pursuant to Rule 29, Arizona Rules of Civil Appellate Procedure. For reasons that follow we affirm the trial court .

Phoenix Systems International, Inc. ("PSI") through its chief executive officer , Gordon E. Fitzgerald ("Fitzgerald"), retained Alan P. Bayham, Jr. ("Bayham") to file a breach of contract action on behalf of PSI. Bayham unsuccessfully sought summary judgment but apparently did nothing further for almost a year. Due to Bayham's alleged deleterious conduct, PSI's claim was settled for considerably less than Fitzgerald believed it to be worth.

PSI was dissolved as a corporation in August 1992. Fitzgerald filed a derivative suit as the statutory liquidator for PSI against Bayham for legal malpractice and attempted to act as pro se counsel for PSI. The trial court dismissed the lawsuit.

Fitzgerald filed a second lawsuit in 1993 as the sole director /statutory trustee and assignee of PSI's claim against Bayham. Bayham's counsel filed a Motion to Dismiss on the grounds that the claim was one for tort (legal malpractice), belonging to the corporation , and was not assignable under Arizona law, citing Schroeder v. Hudgens, 142 Ariz. 395, 690 P.2d 114 (App. 1984)

Judge Michael Irwin granted the Motion to Dismiss after finding that the action "although sounding in contract, is a legal malpractice action which is non-assignable." Fitzgerald filed a Motion to Amend the Complaint to assert title to all property of PSI, including its cause of action for malpractice. The trial court ruled that the motion was untimely and denied the Motion. Fitzgerald than appealed. Although some complications developed in the transmission and filing of orders in Maricopa County Superior Court , we conclude that we have jurisdiction over Fitzgerald's appeal from the grant

of Bayham's Motion to Dismiss and the Denial of Fitzgerald's Motion to Amend. [2]

DISCUSSION

In the appeal, Fitzgerald argues that PSI's breach of contract claim against Bayham for malpractice could be assigned to him. He also argues that Ariz. Rev. Statute. Ann. ("A.R.S.") sections 10-087 and 10-105 "transferred title of all PSI claims / property" to him as sole remaining shareholder and that PSI's malpractice claim against Bayham is property for purposes of the statute. He further contends that the trial court erred in denying him permission to amend the complaint to seek relief on all of PSI'S claims.

A. Arizona Law Governs the Question of Assignment and Determines the Nature of an Action for Legal Malpractice.

We note at the outset that Fitzgerald has cited in his written brief and in oral argument numerous cases from other jurisdictions as well as treatises and other publications. Although we might adopt the reasoning of another state's courts if an Arizona law is similar to or perhaps even taken from that state's law, we are not required to follow decisions from any other state's courts. Thus, our state law may differ from that of other states. This court is bound only by decisions of our own supreme court in matters of state law. Low Grubb Chevrolet v. Industrial Comm'n, 171 Ariz. 183, 188, 829 P.2d 1229 1234 (App 1991).

B. Ownership of the Cause of Action for Malpractice is a Question of Arizona State Law.

First, we turn to the contention that Fitzgerald gained title to PSI's cause of action for malpractice after PSI was dissolved and that he may sue in his own name on that claim. Fitzgerald cites two statutes in support of his claim that under state law, PSI's malpractice claim was corporate property transferred to him as the sole remaining shareholder after dissolution.

ARS section 10-087(1990) governs the procedure for winding up a corporation after it files notice of an intent to dissolve. Subsection 9A)(3) provides that the corporation

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[2] Bayham's counsel filed Motion to Dismiss the Appeal. That motion is implicitly denied by our ruling herein.

shall distribute any assets remaining after discharge of corporate liabilities among the shareholders . This statute does not convert a corporate asset, such as a cause of action for malpractice, into property belonging to an individual shareholder.

ARS section 10-105 provides that the dissolution of a corporation

> shall not take away or impair any remedy available to ...such corporation, its directors, officers or shareholders, for any right or claim existing, or any liability incurred , prior to such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders , directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim.

A.R.S. §10-105 (1990) (emphasis added). Although the statute permits the shareholders, directors, or officers to enforce a corporation's remedy, right or claim, it does not convert a corporate claim into a shareholder's personal claim.

For purposes of this appeal, we assume that PSI had a claim for legal malpractice against Bayham; under the authority of section 10-105, Fitzgerald as shareholder, director, and officer could have entered a suit filed in the corporation's name on that claim. But, the injury was to the corporation; any cause of action belonged to it. Bayham was the attorney for the corporation, and PSI , not Fitzgerald, was his client.

"Generally, even where all of the stock in a corporation is owned by a sole shareholder , he may not maintain an action individually for wrongs against the corporation " Schroeder, 142 Ariz. at 398, 690 P.2d at 117.; Funk v. Spalding , 74 Ariz. 219, 223, 246,P.2d 184 186 (1952). This rule is predicated on the separation of an individual who forms the corporation from the corporate entity, the corporate form protects the individual from personal financial liability for corporate acts. See Ferrarell v. Robinson, 11 Ariz. App. 473, 475, 465 P.2d 610, 612 (1970). In return, however, the individual does not "own" the corporation's claims or causes of action although he may act to protect the corporation's claims.

Once dissolved, PSI's property may reside in Fitzgerald as the remaining shareholder, but A.R.S. section 10-105 does

not convert that property to the Fitzgerald's own. It permits the shareholder to 'protect' (a dissolved corporation's) remedy , right or claim." In the first lawsuit against Bayham , Fitzgerald was not representing himself or suing for injuries personal to himself. He was attempting to represent the corporation. As a non-lawyer , Fitzgerald could not act as an attorney for PSI. The first lawsuit was properly dismissed for that reason.

C. PSI's Purported Assignment of its Cause of Action to Fitzgerald is a Matter of State Law

Fitzgerald attempted to substitute himself for PSI in the second lawsuit through the medium of an "assignment" of the corporate claim.[3] "The determination of whether the ownership of a cause of action is transferable ... must be made in accordance with state law". Schroeder, 142 Ariz. at 399, 690 P.2d at 118.

In Arizona , absent a statute to the contrary, the entity or person possessing a cause of action for personal injuries cannot assign that action to another. Karp v Speizer, 132 Ariz. 599, 600, 647 P.2d 1197, 1198 (App. 1982). Furthermore, in Arizona an action asserting negligent failure to act by an attorney is a tort claim for personal injury and not a contract claim. Long v. Buckley, 129 Ariz. 141,143, 639 P.2d 557, 559 (app. 1981).[4] Generally, this advantageous

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[3] Under the common Law, a cause of action for personal injury did not survive the death of either party. Some state legislatures, such as Illinois' enacted statutes to permit some causes of action to 'survive' the death of the person entitled to sue or be sued. Jones v.Siesennop, 371 N.E. 2d 892 (Ill. 1977)involving a survival statute which permits actions to recover , damages to personal property to survive the death of either party to the action. In Jones, the court held that the original plaintiff's personal representative could be substituted as a party plaintiff in an action for legal malpractice. Id . at 896. Jones did not concern assignment of a cause of action, however, and the Illinois court later held that a cause of action for legal malpractice is not assignable. Clement v. Prestwich, 448 N.E. 2d 1039 (Ill.1983).

[4] In Long, the court reversed a grant of summary judgment on the question of when the plaintiff suing his attorney for legal malpractice knew of his injury for purposes of the tort statute of limitations. Id at 144. The plaintiff also alleged a breach of contract. The retainer agreement between the attorney and client , however, dealt only with the payment of

to an injured client because the range of damages available is greater for tort than contract.

As a claim for personal injury, a malpractice action is not assignable. Preferred Risk Mut. Ins. Co. v . Vargas, 157, Ariz. 17, 18, 754 P.2d 346, 347(app. 1988) ; Employer's Cas. Co. v. Moore, 60 Ariz. 544,547-48, 142 P.2d 414, 415 (1943). A person or entity having "a non assignable cause of action "could not by agreement give his attorney or other person any interest therein. " ID at 549. The legislature may abrogate the common law prohibition on assignment of causes of action for personal injury, see Preferred Risk, 157 Ariz. at 19, 754 P.2d at 348, but nothing in the Arizona statutes or cases cited by Fitzgerald supports a conclusion that a right of action for personal injury caused by an attorney's legal malpractice is assignable. Neither Franko v. Mitchell, 158 Ariz. 391, 762 P.2d 1345 (App 1988) nor Ficket v. Superior Court , 27 Ariz. App. 793 558 P.2d 998 (1976) holds that a malpractice claim is assignable. They concern the potential duty an attorney owes to a non-party to the attorney-client relationship. Franko, 158 Ariz. at 400, 762 P.2d at 1354.

Fitzgerald claims that Schroeder is no longer good law, but the only aspect of Schroeder no longer valid is the statement, 142, Ariz. at 400, 690 P.2d at 120, that privity of contract is required to uphold a claim for legal malpractice. Franko, 158 Ariz. at 399 n.1, 72 P.2d at 1353 n.1

Therefore, the claim for malpractice is a claim for personal injuries suffered by PSI: because it is a tort claim, PSI could not assign its claim to Fitzgerald.

CONCLUSION

Arizona courts have held in the past that a claim for legal malpractice is a tort action to recover for personal injuries and is not assignable. We also find that the legislature by enactment of A.R.S. section 10-1-105 has not authorized a director, officer or shareholder to sue as an individual to recover on the corporation's claim for legal malpractice.

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fees and failed contain a promise to perform any specific acts. This court affirmed the grant of summary judgment against the client on the contract claim. Id. at 146.

Again, any such claim must be brought "in its corporate name." Fitzgerald, therefore, cannot bring this action in his own right for injuries to the corporation. The trial court properly granted the Motion to Dismiss. Because permission to amend the complaint would have been futile, we find no error in the denial of the Motion to Amend the Complaint. We affirm the trial court.

_____s_____

Joe W. Contreras, Presiding Judge

Appendix 3

Supreme Court
State of Arizona
September 14, 1995

RE: GORDON E. FITZGERALD vs. ALAN P. BAYHAM, JR. et ux ROBERT BEUCLER et al.
Supreme Court No. CV-95-0276-PR/A
Court of Appeals No. 1 CA-CV 94-0401A
Maricopa County No. CV 93-12736

GREETINGS;

The following action was taken by the Supreme Court of the State of Arizona on September 12, 1995, in regard to the above-referenced cause ;

ORDERED; Motion to Strike Appellee Response to Petition for Review and or Alternatively for Summary Remand of this Case to Trial Court Based on Constitutional & Statutory Grounds =DENIED
FURTHER ORDERED: Motion to Strike Petition for Review and/or Reference to Disciplinary Proceeding or Alternatively for Summary Dismissal of the Petition for Review = DENIED
FURTHER ORDERED : Petition for Supreme Court Review of May 19, 1995 Accelerated Appeal Decision = DENIED
FURTHER ORDERED: Request for Attorneys' Fees [Alan P. Bayham, Jr., et. al.] = DENIED
Record returned to Court of Appeals, Division one. Phoenix, this 14th day of September 1995.

NOEL K. DESSAINT, Clerk

Appendix 4

In the Court of Appeals, State of Arizona, Division One

Gordon E. Fitzgerald,
Plaintiff Appellant,
v.
Alan P. Bayham , Jr. et al
Defendants-Appellees

1 CA CV94-0401-A

Department E
Maricopa County
Superior Court
CV 93-12736

ORDER

Appellant's Motion to Stay, Appellees' Response to Appellant's Motion to Stay, Appellant's Reply to Appellee Response to Motion to Stay, Appellees' Response to Reply to Appellee Response to Motion to Stay which Asks for Reconsideration , and Appellant's Reply to Appellee 2nd Illegal Response eto Motion to Stay have been considered by Presiding Judge Joe W. Contreras and Judges Ruth V. McGregor and Melvyn T. Shelley. The court notes that the Supreme court of Arizona denied Appellant's Petition for Review on September 15, 1995. This court is without jurisdiction to Stay a Mandate which will issue in due course. In the event Appellant is seeking a Stay for the purpose of filing a Petition for Writ of Certiorari then such Motion should be directed to the United States Supreme Court . Accordingly,

IT IS ORDERED denying Appellants Motion to Stay.

Dated this 23rd day of October , 1995

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Joe W. Contreras, Presiding judge

FILED Glen D. Clark, Clerk October 23, 1995

Appendix 5

Stephen M. Kemp, City Attorney
Office of the City Attorney
CITY OF PEORIA
8401 West Monroe, Room 340
Peoria, Arizona 85345
(602) 412-7043 (Facsimile)

FILED OCT 07 1994
State Bar of Arizona
by: Nicki l. Keesee

BEFORE THE STATE BAR OF ARIZONA
HEARING COMMITTEE 6 A

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,
ALAN PHILLIP BAYHAM JR.,
Respondent

No. 91-1625
Assigned to Hrg. Comm. 6A

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

This matter having come before Hearing Committee 6A and the State Bar of Arizona, through its bar counsel, and Respondent through his counsel having submitted Proposed Findings of Fact, Conclusions of Law and Recommendations as to sanction to be imposed. The hearing Committee makes the following findings of fact.

FINDINGS OF FACT

1. Respondent has been a member in good standing of the State Bar of Arizona since 1977.
2. Respondent has no prior disciplinary record.
3. On or about May 14, 1990, Respondent was retained by Gordon Fitzgerald for Phoenix Systems International (PSI) for litigation against Phoenix General Hospital and Medical Center (PGH). Respondent agreed to represent PSI on a contingency fee basis and did not require a retainer from PSI.
4. On or about May 18, 1990, Respondent filed a complaint against PGH on behalf of PSI in Cause No.

CV 90-14252, Maricopa County Superior Court alleging that PGH breached its licensing contract with PSI regarding use of certain computer software developed and marketed by PSI and seeking $70,000 in damages. *1

5. On or about June 29, 1990, Respondent filed a Motion for Summary Judgment on behalf of PSI in cause No. CV 90-14252, Maricopa County Superior Court.

6. On August 14, 1990, the Court heard cross Motions for Summary Judgment in PSIvPGH. During argument Judge Goodfarb indicated that he found a contract, an obligation and a breach by defendant PGH. The court indicated that it must deny PSI's Motion for Summary Judgment due to the existence of genuine issues of material fact raised by Defendant.

7. That Donald Peters, attorney for PGH testified that his client believed factual defenses existed in PSI v. PGH, with the likelihood that the matter could be contested.

8. Upon receipt of the Court's ruling on the Motion for Summary Judgment, Respondent asked Gordon Fitzgerald to provide an outline as to how he felt the case should be tried. At that time, Respondent advised Mr. Fitzgerald that he would seek a trial date.

9. On or about August 30, 1990, Gordon Fitzgerald, CEO for PSI, mailed to Respondent a detailed analysis of how PSI thought the case should be pursued. This information listed evidence, lay and expert witnesses , and financial data. Further, Mr. Fitzgerald requested in said letter that Respondent call Mr. Frkovich of Ernst & Young as a witness during trial.

10. Subsequent to August 22, 1990, Respondent failed to communicate with Gordon Fitzgerald and PSI until he contacted Carol Robinson on or about June 21, 1991.

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*1 . Not correct. $70,000 was for balance due on contract , not damages

This was despite repeated telephone calls and letters from Mr. Fitzgerald who requested communication from Respondent for information about his case.

11. On September 7, 1990, Gordon Fitzgerald sent a letter to Respondent advising him it was imperative that he obtain a court date as soon as possible and requested that Respondent advise him the following week of the court date. Respondent failed to respond to this letter.

12. On September 18, 1990, Mr. Fitzgerald again wrote a letter to Respondent referring to his August 20,1990 letter indicating that he made several attempts to reach Respondent by telephone with no response from Respondent Bayham. The letter also referred to Mr. Fitzgerald's letter of September 7th and also a telephone call to Respondent on September 14th, neither of which were answered by Respondent. The letter mentioned the fact that Respondent's secretary said that Respondent would return his call. However, Respondent failed to respond to Mr. Fitzgerald's telephone call and letters. Mr. Fitzgerald's letter requested that Respondent write to him to let him know the trial date and procedures involved. Respondent failed to respond to this request.

13. On October 18, 1990, Gordon Fitzgerald wrote yet another letter to Respondent stating that his inability to understand why Respondent had still not responded to his many letters and telephone calls. In that letter Mr. Fitzgerald asked Respondent to contact him to advise him if he was still representing PSI and if not to advise him as to the procedure he should follow to get his case in court. Again Respondent completely failed to respond to this letter and communicate with his client.

14. Respondent suffered a disruption to his family with the moving into his household of his adolescent son from a prior marriage resulting in extensive counseling to Respondent and his family.

15 Respondent has acknowledged his failure to respond to PSI's correspondence.

16. On November 27, 1990, Mr. Fitzgerald wrote Respondent again, reminding him that he had no communication from Respondent for several months regarding his plans to try PSI's case and obtain a court date which Respondent said would be done before the end of 1990. In his letter, Mr. Fitzgerald notified Respondent that if he did not hear from him by December 10, in writing, regarding his plans to pursue the matter that he would conclude that Respondent elected to abandon his contractual obligations in representing PSI against PGH. Respondent failed to communicate with his client by not responding to this letter as well.

17. In his letter of November 27,1990, Mr. Fitzgerald informed Respondent that the supplier of the hardware, Rick Mineweaser , had already won his case for summary judgment against PGH.

18. Respondent failed to confirm whether PSI desired the termination of his representation based on a concern that PSI could be left without counsel due to difficulty in finding another lawyer to take this case on a contingent fee.

19. Respondent suffered from illness during the spring of 1991 resulting in his being bedridden for a period of two weeks and subsequently impacting his performance.

20. Respondent, without the knowledge or consent of his client , filed a list of witnesses and exhibits on or about May 24, 1991.

21. On May 28, 1991 , Donald Peters, attorney for PGH, sent a hand delivered letter to Respondent stating that his request for production of documents had been ignored and that if he did not receive satisfactory responses within the next few business days, that he would be forced to file a Motion to Compel. Respondent failed to respond to this letter and to follow-up telephone call from Mr. Peters.

22. On June 13, 1991, Donald Peters , attorney for PGH, filed a Motion to Compel against PSI. In saic motion , PGH alleged that almost a year earlier, on June 20, 1990, PGH served PSI with a short request for production of documents and a set of interrogatories, which had not been responded to by Respondent. Further, Mr. Peters stated that Mr. Bayham did not respond to his letter or to his follow-up telephone call.

23. Respondent Bayham did not file a response to PGH's Motion to Compel.

24. On July 17, 1991, Judge Goodfarb granted PGH's Motion to Compel and ordered that Respondent Bayham pay PGH the sum of two hundred and fifty dollars. ($250). Judge Goodfarb entered an Order striking the Motion to Set filed in PSI's case and indicated by Minute Entry that no Motion to Set would be filed until Respondent complied with the discovery requests ordered. Thereafter, one week later, on July 24, 1991 Respondent sent a letter to Mr. Peters with a stipulation he prepared. In Respondent's stipulation he stated that the matters set forth in PGH's Motion to Compel were resolved shortly after the filing of the motion and that the Motion to Compel was to be withdrawn pursuant to the agreement of the parties prior to Judge Goodfarb awarding sanctions against Respondent Bayham.

25. Upon Receipt of Respondent's stipulation, on July 25, 1991, Mr. Peters faxed a letter to Respondent stating that the proposed stipulation troubled him. Mr. Peters reminded Respondent that he had still not completely complied with his discovery request. Mr. Peters refused to sign Respondent's stipulation stating that the matters had been resolved prior to Judge Goodfarb's issuing of sanctions, but instead drafted his own stipulation deleting the objectionable language. The second stipulation was filed on or about July 30, 1991.

26. On or about June 18, 1991, Respondent filed a Motion to Set and Certificate of Readiness in the PSI v. PGH lawsuit.

27. It was not until June 21, 1991, ten months after Respondent Bayham's last communication with his client, that Respondent called and spoke with Mr. Fitzgerald's daughter , Carol Robinson . Mrs. Robinson advised Respondent that she was puzzled as to why he was calling since she was unaware that he was still representing PSI and further advised Respondent that he should not be contacting her but should be contacting Gordon Fitzgerald.

28. Respondent told Mrs. Robinson that he had been unable to contact Mr. Fitzgerald for the past ten months since his telephone number had changed. Mrs. Robinson advised Respondent that Mr. Fitzgerald's new telephone number was in the phone book and he had not moved in some twenty (20) years so that Respondent could have written him at the same mailing address. Mrs. Robinson gave Respondent Mr. Fitzgerald's new telephone number and Respondent advised here that he would call Mr. Fitzgerald immediately. He did not.

29. On June 28, 1991, Mr. Fitzgerald sent a certified letter to Respondent indicating that Carol Robinson told him that Respondent would be contacting him and to date he had still not done so. Further, Mr. Fitzgerald advised Respondent Bayham that his last communication with him was in November of 1990 and that if he did not communicate with him in writing by December of 1990 that this would indicate that Respondent had abandoned PSI's case.

30. On July 5, 1991, Mr. Fitzgerald sent another letter by certified mail to Respondent. In said letter Mr. Fitzgerald complained that Respondent filed a Motion to

Set without consulting him and that he failed to mail him a copy of the Motion to Set for nearly two weeks.

31. Respondent finally responded to his client in writing by letter dated July 9, 1991. In said letter he admitted that he knew that the matter could have been scheduled for trial faster. Respondent further attempted to excuse his total lack of communication by explaining that he attempted to contact Mr. Fitzgerald by telephone but that his telephone was disconnected and there was no forwarding number indicated. He advised that he spoke with Mr. Fitzgerald's daughter because he was unable to contact him by telephone.

32. That PGH offered a settlement of $30,000 to PSI in July 1991 and that PSI responded with a counter offer of $60,000 to PGH.

33. Mr. Fitzgerald indicated that he believes he was compelled to settle his case for less than he felt he was entitled .

34 That PSI v. PGH was ultimately settled by the parties for $55,000 in August, 1991 and that PGH indicted that a settlement prior to this date was unlikely due to lack of available funds.

35. That no facts have been presented to demonstrate that as a result of Respondent's conduct in this matter the settlement amount was reduced by PGH to the disadvantage of PSI.

36 Respondent sent a letter to David Dow dated August 21, 1991 indicating "I have never withdrawn from the case and have never been informed by Mr. Fitzgerald that I am not his attorney on this matter."

37 Respondent's actions show a lack of communication with his client over the ten-month period.

38. Respondent admitted that he ignored representation of his client PSI for other clients. In Respondent's letter

to the state Bar of November 4, 1991, Respondent stated that he did not correspond with Mr. Fitzgerald after Oral Argument was heard on his Motion for Summary Judgment since he was preparing for trial in Zielin v. Farmers Insurance. Respondent also indicated that he had a number of other matters which required his attention prior to PSI's matter.

39. Respondent did not forward copies of the pertinent documents to PSI shortly after they were either generated by him or received by him. Minute entries and other documents were sent to Mr. Fitzgerald weeks after they were generated and Judge Goodfarb's Minute Entry ordering sanctions had not been delivered to Mr. Fitzgerald until much later.

40. Respondent indicated that he believes that his client's complaint was simply an effort to avoid payment of his attorney's fees.

41. Respondent did not receive any fees from Fitzgerald in this subject matter.

42. In his letter of January 3, 1992 , Respondent mislead the State Bar by stating "I had regular and frequent communication with Fitzgerald throughout the course of the litigation."

43. Respondent in his January 3, 1992 letter to the State Bar admitted that he did not advise his client until July 24, 1991 of the Motion to Compel which had been filed back on June 13, 1991.

44. Respondent failed to admit wrongdoing by stating in his January 3rd letter to the State Bar, "It is my position that throughout the course of this case I represented PSI competently and in a professional manner. "

45. Respondent did cooperate with the State Bar in responding to the allegations.

46. Respondent's conduct in this matter was isolated to this particular case.

CONCLUSIONS OF LAW

1. Respondent violated ER 1.2(a) of Rule 42, Ariz. R.S.Ct. by failing to abide by his client's decisions concerning the objectives of representation and failed to consult with his client as to the means by which they were to be pursued. Specifically, Respondent failed to discuss with his client their request to take the matter to trial immediately and failed to discuss the preparation and submission of the list of witnesses and exhibits.

2. Respondent failed to act with reasonable diligence and promptness in representing his client in violation of ER 1.3. The comment to ER 1.3 of Rule 42 specifically states :

"Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. "

Never once did Respondent contact his client to clarify whether the client-lawyer relationship still existed.

The comment to ER 1.3 also states "A lawyer's workload should be controlled so that each matter can be handled adequately." Respondent failed to balance PSI's litigation with other matters being handled by Respondent at the same time.

3. Respondent failed to adequately communicate with Mr. Fitzgerald , in violation of ER 1.4. Clearly Respondent failed to keep his client reasonably informed about the status of his matter and failed to "promptly" comply with reasonable requests for information."

4. That the Hearing Committee has reviewed the matter for Aggravating and Mitigating facts and finds the following ;

Aggravating Facts

a. Substantial experience in the practice of law.

b. Refusal to acknowledge wrongful nature of conduct.

Mitigating Facts.

a. Personal or emotional problems
b. Physical or mental disability or impairment
c. Absence of prior disciplinary record.

Recommendations

1. The Hearing Committee reviewing the entire record unanimously recommends ;

a. That the Respondent be informally reprimanded
b. That the costs of these proceedings shall be assessed against Respondent in accordance with Rule 53 (e)(3) Rules of the Supreme Court of Arizona.

RESPECTFULLY SUBMITTED this 4th day of October 1994._____/s/ _____
Stephen M. Kemp
Chairman Hearing Committee 6 A